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10/6/88

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## REMARKS

House passed Whistleblower,  
exemptions Remained in-  
tact. NO Amend introduced  
to Review Security Applications  
Senate passed 2 Aug.  
to the President for  
signature.

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October 3, 1988

## CONGRESSIONAL RECORD — HOUSE

MESSAGE FROM THE  
PRESIDENT

A message in writing from the President of the United States was communicated to the House by Mr. Kalbaugh, one of his secretaries.

WHISTLEBLOWER PROTECTION  
ACT OF 1988

Mrs. SCHROEDER. Mr. Speaker, I move to suspend the rules and pass the Senate bill (S. 508) to amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes, as amended.

The Clerk read as follows:

S. 508

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. SHORT TITLE.

This Act may be cited as the "Whistleblower Protection Act of 1988".

## SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—  
(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

(3) in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

(b) PURPOSE.—The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

(2) establishing—

(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

SEC. 2. MERIT SYSTEMS PROTECTION BOARD.  
OFFICE OF SPECIAL COUNSEL: INDIVIDUAL RIGHT OF ACTION.

(a) IN GENERAL.—Chapter 12 of title 5, United States Code, is amended to read as follows:

## "CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

## "SUBCHAPTER 1—MERIT SYSTEMS PROTECTION BOARD

"Sec. 1201. Appointment of members of the Merit Systems Protection Board.

"Sec. 1202. Term of office; filling vacancies; removal.

"Sec. 1203. Chairman; Vice Chairman.

"Sec. 1204. Powers and functions of the Merit Systems Protection Board.

"Sec. 1205. Transmittal of information to Congress.

"Sec. 1206. Annual report.

## "SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

"Sec. 1211. Establishment.

"Sec. 1212. Powers and functions of the Office of Special Counsel.

"Sec. 1213. Provisions relating to disclosures of violations of law, mismanagement, and certain other matters.

"Sec. 1214. Investigation of prohibited personnel practices; corrective action.

"Sec. 1215. Disciplinary action.

"Sec. 1216. Other matters within the jurisdiction of the Office of Special Counsel.

"Sec. 1217. Transmittal of information to Congress.

"Sec. 1218. Annual report.

"Sec. 1219. Public information.

## "SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

"Sec. 1221. Individual right of action in certain reprisal cases.

"Sec. 1222. Availability of other remedies.

## "SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

"§ 1201. Appointment of members of the Merit Systems Protection Board

"The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

"§ 1202. Term of office; filling vacancies; removal

"(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

"(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201.

"(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than 1 year after the date on which the term of the member would otherwise expire under this section.

"(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

"§ 1203. Chairman; Vice Chairman

"(a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

"(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

"(c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.

"§ 1204. Powers and functions of the Merit Systems Protection Board

"(a) The Merit Systems Protection Board shall—

"(1) hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter.

"(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) and enforce compliance with any such order;

"(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

"(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

"(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

"(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—

"(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

"(B) order the taking of depositions from and responses to written interrogatories by any such individual.

"(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

"(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A), upon application by the Board the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a

October 3, 1988

## CONGRESSIONAL RECORD — HOUSE

H 9315

ister oaths, examine witnesses, take depositions, and receive evidence.

"(2) The Special Counsel may—

"(A) issue subpoenas; and

"(B) order the taking of depositions and order responses to written interrogatories; in the same manner as provided under section 1204.

"(3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), upon application by the Special Counsel, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

"(4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

"(c) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Special Counsel may appear for the Office of Special Counsel, and represent the Office, in any civil action brought in connection with any function carried out by the Office pursuant to this title or as otherwise authorized by law.

"(d)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

"(2)(A) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual, except as provided in subparagraph (B).

"(B) The Special Counsel may intervene as a matter of right in an action or appeal referred to in subparagraph (A) if—

"(i) the individual bringing such action or appeal has been charged with conduct constituting a prohibited personnel practice, and the Special Counsel has reasonable grounds to believe that the prohibited personnel practice has occurred, exists, or is to be taken; or

"(ii) the agency initiated the contested personnel action against the individual with the approval of the Special Counsel under section 1214(f).

"(3)(A) The Special Counsel may obtain judicial review of any final order or decision of the Merit Systems Protection Board in any proceeding in which the Special Counsel was a party (other than an order or decision in an action brought under section 1215, unless or to the extent that the order or decision involves conduct covered by section 2302(b)(8)).

"(B) A petition for review under this paragraph shall be filed with such court, and within such time, as provided for under section 7703(b).

"(e)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

"(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

"(f) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

"(g) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

"(h)(1) The Special Counsel may not respond to any inquiry or provide information concerning any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

"(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a person described in paragraph (1)—

"(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or

"(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to information the unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

"§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

"(a) This section applies with respect to—

"(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—

"(A) a violation of any law, rule, or regulation; or

"(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and

"(2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, former employee, or applicant reasonably believes evidences—

"(A) a violation of any law, rule, or regulation; or

"(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety

"(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial

and specific danger to public health and safety.

"(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—

"(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

"(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

"(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—

"(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or

"(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

"(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

"(1) a summary of the information with respect to which the investigation was initiated;

"(2) a description of the conduct of the investigation;

"(3) a summary of any evidence obtained from the investigation;

"(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

"(5) a description of any action taken or planned as a result of the investigation, such as—

"(A) changes in agency rules, regulations, or practices;

"(B) the restoration of any aggrieved employee;

"(C) disciplinary action against any employee; and

"(D) referral to the Attorney General of any evidence of a criminal violation.

"(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

"(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

"(A) the findings of the head of the agency appear reasonable; and

"(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

"(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General.

"(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c) of

H 9316

## CONGRESSIONAL RECORD — HOUSE

October 3, 1986

this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General together with a statement noting the failure of the head of the agency to file the required report.

"(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General—

"(1) the report shall not be transmitted to the complainant; and

"(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

"(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head. If the Special Counsel does not transmit the information to the head of the agency, the Special Counsel shall return any documents and other matter provided by the individual who made the disclosure.

"(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

"(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall—

"(A) return any documents and other matter provided by the individual who made the disclosure; and

"(B) inform the individual of—

"(i) the reasons why the disclosure may not be further acted on under this chapter; and

"(ii) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

"(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines—

"(1) that the disclosure of the individual's identity is necessary in order to carry out the functions of the Special Counsel; or

"(2) that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

"(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is—

"(1) specifically prohibited from disclosure by any other provision of law; or

"(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

"(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

#### § 1221. Investigation of prohibited personnel practices; corrective action

"(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

"(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

"(i) the allegation has been received by the Special Counsel; and

"(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

"(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall—

"(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

"(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

"(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

"(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

"(i) the termination of the investigation;

"(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person; and

"(iii) the reasons for terminating the investigation.

"(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

"(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice de-

scribed in section 2302(b)(8), from the Special Counsel and—

"(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

"(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

"(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

"(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

"(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

"(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

"(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

"(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

"(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

"(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

"(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—

"(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

"(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

"(2)(A) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to

October 3, 1988

## CONGRESSIONAL RECORD — HOUSE

H 9317

the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

"(B) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

"(C) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

"(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

"(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

"(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

"(4)(A) The Board shall order such corrective action as the Board considers appropriate. If the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8), has occurred, exists, or is to be taken.

"(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against the individual.

"(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

"(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained—

"(A) by any employee, former employee, or applicant for employment adversely affected by such order or decision; or

"(B) by the Special Counsel.

"(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

"(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

"(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

"(A) the alleged violation has been reported to the Attorney General; and

"(B) the Attorney General is pursuing an investigation, in which case the Special Counsel has discretion as to whether to proceed.

"(e) If, in connection with any investigation under this subchapter, the Special

Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

"(1) that the head of the agency has personally reviewed the report; and

"(2) what action has been or is to be taken, and when the action will be completed.

"(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

#### "§ 1215. Disciplinary action

"(a)(1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having—

"(A) committed a prohibited personnel practice,

"(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or

"(C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.

"(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to—

"(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

"(B) be represented by an attorney or other representative;

"(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

"(D) have a transcript kept of any hearing under subparagraph (C); and

"(E) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

"(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.

"(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under section 7703(b).

"(5) In the case of any State or local officer or employee under chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.

"(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement re-

ferred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

"(c)(1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

"(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

#### "§ 1216. Other matters within the jurisdiction of the Office of Special Counsel

"(a) In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning—

"(1) political activity prohibited under subchapter III of chapter 73, relating to political activities by Federal employees;

"(2) political activity prohibited under chapter 15, relating to political activities by certain State and local officers and employees;

"(3) arbitrary or capricious withholding of information prohibited under section 552, except that the Special Counsel shall make no investigation of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

"(4) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

"(5) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

"(b) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in subsection (a)(5), if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

"(c)(1) If an investigation by the Special Counsel under subsection (a)(1) substantiates an allegation relating to any activity prohibited under section 7324, the Special Counsel may petition the Merit Systems Protection Board for any penalties provided for under section 7325.

"(2) If the Special Counsel receives an allegation concerning any matter under paragraph (3), (4), or (5) of subsection (a), the Special Counsel may investigate and seek corrective action under section 1214 in the same way as if a prohibited personnel practice were involved.

#### "§ 1217. Transmittal of information to Congress

"Notwithstanding any other provision of law or any rule, regulation, or policy directive, the Special Counsel or any employee of the Special Counsel designated by the Special Counsel, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Office, without review, clearance, or ap-



H 9318

## CONGRESSIONAL RECORD — HOUSE

October 2, 1988

proval by any other administrative authority.

#### § 1218. Annual report

"The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

#### § 1219. Public information

"(a) The Special Counsel shall maintain and make available to the public—

"(1) a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;

"(2) a list of matters referred to heads of agencies under section 1215(c)(2);

"(3) a list of matters referred to heads of agencies under subsection (f) of section 1214, together with certifications from heads of agencies under such subsection; and

"(4) reports from heads of agencies under section 1213(g)(1).

"(b) The Special Counsel shall take steps to ensure that any list or report made available to the public under this section does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

#### "SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

##### § 1221. Individual right of action in certain reprisal cases

"(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

"(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

"(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

"(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

"(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

"(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

"(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

"(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence.

"(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

"(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

"(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

"(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

"(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

"(g) If an employee, former employee, or applicant for employment is the prevailing party, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

"(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

"(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

"(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

"(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

##### § 1222. Availability of other remedies

"Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

(b) CONFORMING AMENDMENT.—The analysis for part II of title 5 of the United States Code is amended by striking the item relating to chapter 12 and inserting the following:

"12. Merit Systems Protection Board, Office of Special Counsel, and Individual Right of Action 1201"

#### SEC. 4. REPRISALS.

(a) AMENDMENTS TO SECTION 2302(b)(8).—Section 2302 (b)(8) of title 5, United States Code, is amended—

(1) by inserting ", or threaten to take or fail to take," after "take or fail to take";

(2) by striking out "as a reprisal for" and inserting in lieu thereof "because of";

(3) in subparagraph (A) by striking out "a disclosure" and inserting in lieu thereof "any disclosure";

(4) in subparagraph (A)(ii) by inserting "gross" before "mismanagement";

(5) in subparagraph (B) by striking out "a disclosure" and inserting in lieu thereof "any disclosure"; and

(6) in subparagraph (B)(ii) by inserting "gross" before "mismanagement".

(b) AMENDMENT TO SECTION 2302(b)(9).—Section 2302(b)(9) of title 5, United States Code, is amended to read as follows:

"(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

"(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

"(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

"(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

"(D) for refusing to obey an order that would require the individual to violate a law";

#### SEC. 5. PREFERENCE IN TRANSFERS FOR WHISTLE-BLOWERS.

(a) IN GENERAL.—Subchapter IV of chapter 33 of title 5, United States Code, is amended by adding at the end thereof the following new section:

##### "§ 3352. Preference in transfers for employees making certain disclosures

"(a) Subject to the provisions of subsections (d) and (e), in filling a position within any Executive agency, the head of such agency may give preference to any employee of such agency, or any other Executive agency, to transfer to a position of the same status and tenure as the position of such employee on the date of applying for a transfer under subsection (b) if—

"(1) such employee is otherwise qualified for such position;

"(2) such employee is eligible for appointment to such position; and

"(3) the Merit Systems Protection Board makes a determination under the provisions of chapter 12 that a prohibited personnel action described under section 2302(b)(8) was taken against such employee.

"(b) An employee who meets the conditions described under subsection (a)(1), (2), and (3) may voluntarily apply for a transfer to a position, as described in subsection (a), within the Executive agency employing such employee or any other Executive agency.

"(c) If an employee applies for a transfer under the provisions of subsection (b) and the selecting official rejects such application, the selecting official shall provide the employee with a written notification of the reasons for the rejection within 30 days after receiving such application.

"(d) An employee whose application for transfer is rejected under the provisions of subsection (c) may request the head of such agency to review the rejection. Such request for review shall be submitted to the head of

October 3, 1988

CONGRESSIONAL RECORD — HOUSE

115319

the agency within 30 days after the employee receives notification under subsection (c). Within 30 days after receiving a request for review, the head of the agency shall complete the review and provide a written statement of findings to the employee and the Merit Systems Protection Board.

"(e) The provisions of subsection (a) shall apply with regard to any employee—

"(1) for no more than 1 transfer;

"(2) for a transfer from or within the agency such employee is employed at the time of a determination by the Merit Systems Protection Board that a prohibited personnel action as described under section 2302(b)(8) was taken against such employee; and

"(3) no later than 18 months after such a determination is made by the Merit Systems Protection Board.

"(f) Notwithstanding the provisions of subsection (a), no preference may be given to any employee applying for a transfer under subsection (b), with respect to a preference eligible (as defined under section 2108(3)) applying for the same position."

(b) **TECHNICAL AMENDMENT.**—The table of sections for chapter 33 of title 5, United States Code, is amended by inserting after the item relating to section 3351 the following:

"3352. Preference in transfers for employees making certain disclosures."

#### SEC. 6. INTERIM RELIEF.

Section 7701 of title 5, United States Code, is amended—

(1) by redesignating subsection (b) as paragraph (1) of subsection (b); and

(2) by adding at the end thereof the following new paragraph:

"(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

"(i) the deciding official determines that the granting of such relief is not appropriate; or

"(ii) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

"(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

"(B) If an agency makes a determination under subparagraph (A)(ii) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

"(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final."

#### SEC. 7. SAVINGS PROVISIONS.

(a) **ORDERS, RULES, AND REGULATIONS.**—All orders, rules, and regulations issued by the Merit Systems Protection Board or the Special Counsel before the effective date of this Act shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed.

(b) **ADMINISTRATIVE PROCEEDINGS.**—No provision of this Act shall affect any administrative proceeding pending at the time such provisions take effect. Orders shall be issued

in such proceedings, and appeals shall be taken therefrom, as if this Act had not been enacted.

(c) **SUITS AND OTHER PROCEEDINGS.**—No suit, action, or other proceeding lawfully commenced by or against the members of the Merit Systems Protection Board, the Special Counsel, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act, shall abate by reason of the enactment of this Act. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted.

#### SEC. 8. AUTHORIZATION OF APPROPRIATIONS: RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978: TRANSFER OF FUNDS.

(a) **AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated—

(1) for each of fiscal years 1989, 1990, 1991, 1992, and 1993, \$20,000,000 to carry out subchapter I of chapter 12 of title 5, United States Code (as amended by this Act); and

(2) for each of fiscal years 1989, 1990, and 1991, \$5,000,000 to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).

(b) **RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978.**—No funds may be appropriated to the Merit Systems Protection Board or the Office of Special Counsel pursuant to section 903 of the Civil Service Reform Act of 1978 (5 U.S.C. 5509 note).

(c) **TRANSFER OF FUNDS.**—The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available to the Special Counsel of the Merit Systems Protection Board are, subject to section 1531 of title 31, United States Code, transferred to the Special Counsel referred to in section 1211 of title 5, United States Code (as added by section 3(a) of this Act), for appropriate allocation.

#### SEC. 9. TECHNICAL AND CONFORMING AMENDMENTS.

(a)(1) Section 2303(c) of title 5, United States Code, is amended by striking "the provisions of section 1206" and inserting "applicable provisions of sections 1214 and 1221".

(2) Sections 7502, 7512(E), 7521(b)(C), and 7542 of title 5, United States Code, are amended by striking "1206" and inserting "1215".

(3) Section 1109(a) of the Foreign Service Act of 1980 (22 U.S.C. 4139(a)) is amended by striking "1206" and inserting "1214 or 1221".

(b) Section 3393(g) of title 5, United States Code, is amended by striking "1207" and inserting "1215".

#### SEC. 10. BOARD RESPONDENT.

Section 7703(a)(2) of title 5, United States Code, is amended to read as follows:

"(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent."

#### SEC. 11. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 90 days following the date of enactment of this Act.

The SPEAKER pro tempore. Is a second demanded?

Mr. HORTON. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentlewoman from Colorado [Mrs. SCHROEDER] will be recognized for 20 minutes and the gentleman from New York [Mr. HORTON] will be recognized for 20 minutes.

The Chair recognizes the gentlewoman from Colorado [Mrs. SCHROEDER].

(Mrs. SCHROEDER asked and was given permission to revise and extend her remarks, and include extraneous matter.)

Mrs. SCHROEDER. Mr. Speaker, If there were an Olympic event in legislative compromise—a sport in which perseverance, intelligence, charm, and steadfastness played pivotal roles—the Gold Medalist would be FRANK HORTON. Because of FRANK HORTON's efforts, we are able to present to the House a whistleblower protection bill supported by both the Reagan administration and the ACLU; a bill endorse by Federal unions and managers.

The Committee on Post Office and Civil Service reported H.R. 25, strong whistleblower legislation, 14 months ago. The administration opposed that bill. Representative HORTON told them that was not good enough. He convinced OMB Deputy Director Joe Wright that good whistleblower protection legislation which the administration could support could be developed. Frankly, I was a doubter. I was not sure a good compromise could be reached. Well, FRANK HORTON forced us to negotiate. It was long, it was not pleasant; but, it resulted in a good bill which everyone can support.

Congress in 1978 created statutory whistleblower protection for Federal employees in the Civil Service Reform Act. That scheme has failed for two basic reasons: first, the Merit Systems Protection Board and the courts have construed the law very narrowly, virtually wiping out recourse for whistleblowers. Second, the Special Counsel—the official established to protect employees—misunderstood its job. The Special Counsel said it was trying to protect the merit system. But, instead of trying to protect victims of prohibited personnel practices, the Special Counsel started attacking the very people who came to the office for help.

In this bill, we deal with both problems. We specifically reverse or modify a number of MSPB and judicial decisions. Most importantly, the Board created an affirmative defense for agencies which provided that if an agency could show that there were other grounds to take a personnel action, the action would stand even if

the action was taken largely for improper, retaliatory motives. We rewrite the test to make it quite easy for a whistleblower to prove a prima facie case of retaliation and to force the agency to prove, by clear and convincing evidence, that the action would have been taken in the absence of the protected disclosure.

Courts held that, where an employee went to the Special Counsel and the Special Counsel decided not to help, the employee was out of luck. We eliminate that problem by giving employees an individual right of action to take their cases to the Board. MSPB decided it had no power to issue orders to protect witnesses during Special Counsel investigations, that it had no power to order interim relief for employees winning at the administrative judge level, and that an employee who decided to take his or her retirement when faced with an adverse action, could not then appeal the adverse action. All these decisions were bad and we reverse them in this bill. The courts said that MSPB could not defend its own jurisdiction or procedures in court on appeal. That decision was silly, so we reverse that decision as well.

As for the conduct of the Office of Special Counsel, correction required precise provisions limiting the authority of the Special Counsel. We made the office an independent agency to avoid any possibility of undue influence. We limited the Special Counsel's ability to intervene in cases, and release information, and we stripped away the office's power to block employees' access to the MSPB. And, we wrote in a purposes section to clearly communicate that the job of the Special Counsel is to represent and protect employees and never act to their detriment. To hold the Special Counsel accountable to do the job right, we wrote a 3-year sunset into the bill. If Special Counsel returns to the sort of antiemployee conduct it has so frequently exhibited in the past, the office will be terminated on September 30, 1991.

Because of the imminent end of the session, we skipped conference and worked out an agreed version with the Senate, which is the bill we are presenting today. To explain the compromises contained in this version, we developed a joint explanatory statement which follows:

#### JOINT EXPLANATORY STATEMENT INTRODUCTION

The Senate, on August 8, 1988, passed S. 508, the Whistleblower Protection Act (See S. Rpt. 100-413). One year earlier, on August 5, 1987, the House Committee on Post Office and Civil Service favorably reported H.R. 25 (See H. Rpt. 100-274).

From the time that the House Committee reported the legislation in August 1987 to the present, there have been extensive negotiations to develop a version of H.R. 25 which would be acceptable to the Administration and address the serious problems with the current federal employee whistleblower protection scheme. The negotiations

culminated in a draft dated September 22, 1988. Due to the imminent end of the 100th Congress, Rep. Pat Schroeder and Rep. Frank Horton, the House sponsors of the legislation, decided that it would expedite consideration if differences between S. 508, as passed, and the September 22 draft of H.R. 25 could be resolved prior to House consideration.

The amendment brought to the House today, October 3, is the result of those negotiations with the Senate. If the House passes the Senate bill with the amendment, the same language will be presented to the Senate. Senate passage will clear the legislation for the President.

This joint explanatory statement explains new provisions of the version being considered. Some provisions in the amendment were contained in both H.R. 25, as reported, and S. 508, as passed. Those provisions are not discussed in this document but are fully discussed in the Senate report, the House report, or both.

Code sections cited are in title 5, United States Code, as amended by the House amendment.

#### 1. Purpose

Section 2(b) of the bill lays out the purpose of the bill. Simply stated, the bill seeks to eliminate two types of impediments which have made it unduly difficult for whistleblowers and other victims of prohibited personnel practices to win redress. One category of impediments is a string of restrictive Merit Systems Protection Board and federal court decisions. Specific provisions of the bill modify or overturn inappropriate administrative or judicial determinations and make it more likely that whistleblowers and other victims of prohibited personnel practices will win their cases.

The second category of impediments are due to the policies of the Office of Special Counsel and stem from the Special Counsel's view of its role. The clear intent of the Civil Service Reform Act of 1978 (P.L. 94-454) was that the Special Counsel should protect and defend the rights of employees who were the victims of prohibited personnel practices. Nevertheless, the Office of Special Counsel determined that its role was to protect the merit system. And, as the General Accounting Office pointed out in its 1985 report on the operations of the Office of Special Counsel (GAO/GGD-85-53), the law could be read to support the Special Counsel's view.

The two divergent views of the role of the Office of Special Counsel—protection of the victims of prohibited personnel practices and protection of the merit system—do not conflict in most cases. However, the Special Counsel's view of the role of the Office—protecting the merit system—can and has led to instances in which the Special Counsel has acted to the actual detriment of employees seeking help from that Office. Such instances are at odds with our view of the very purpose of this Office. The purpose set out in section 2, as well as a number of operative provisions contained in the bill, is intended to foreclose the possibility that the Special Counsel will act to the detriment of an employee who comes to the Special Counsel for help.

There should be no doubt about legislative intent in passing this bill. Individuals should be able to go to the Special Counsel to make a disclosure under section 1213 of title 5, United States Code, to complain about a prohibited personnel practice under section 1214, or to allege a violation of another law within the jurisdiction of the Special Counsel under section 1216, without any fear that the information they provide or the investigation their disclosure triggers is

used against them. Simply put, the Special Counsel must never act to the detriment of employees who legitimately seek the help of the Special Counsel. Unless employees have confidence that they will not be hurt by going to the Special Counsel—that the Special Counsel is a safe haven—the Office can never be as effective as Congress intends in protecting victims of prohibited personnel practices.

Language in the Senate-passed bill saying that the Special Counsel may not act contrary to the interests of employees was deleted as unnecessary.

#### 2. Antiharassment authority of Board

Section 1204(e)(1)(B) authorizes the Merit Systems Protection Board to grant protective orders to protect a witness or other individual from harassment either during a proceeding before the Board or during a Special Counsel investigation. Such an order may be granted upon a request from the Special Counsel or any other person, whether or not a party to the case, or on the Board's own motion except that an agency may not request a protective order concerning an investigation by the Office of Special Counsel during the course of such investigation.

This provision is intended to protect witnesses in order to aid the fact-finding process. Without the candid and honest testimony of those involved in the underlying relevant facts, unimpeded by threats or intimidation, prohibited personnel practice cases could easily be undermined by the defendant agency. The authority granted to the Board under this provision is intended to protect employees who are cooperating with such investigation from harassment by other employees.

#### 3. Special Counsel intervention in adverse action and independent right of action cases

Section 1212(d) establishes the rules under which the Special Counsel may intervene in proceedings before the Merit Systems Protection Board. Where the proceeding is an appeal from an adverse action under section 7701 of title 5, United States Code, or an individual right of action created by newly added section 1221 of title 5, United States Code, the general rule is that the Special Counsel may not intervene without the consent of the individual bringing the action.

Two exceptions are provided. One exception, contained in section 1212(d)(2)(B), provides that the Special Counsel may intervene where the individual has been charged by the agency with conduct constituting a prohibited personnel practice and the Special Counsel has reasonable grounds to believe that such a prohibited personnel practice has occurred, exists, or is to be taken. The Special Counsel could only have such reasonable grounds where through an independent investigation, the Special Counsel has uncovered probative evidence concerning the employee's alleged prohibited personnel practice. Under no other circumstances is intervention, without the consent of the individual bringing the action, permitted.

It should be noted that the Special Counsel can intervene to argue that the conduct alleged by the agency constitutes a prohibited personnel practice other than the one alleged by the agency. It is not permitted, however, for the Special Counsel to intervene and assert a prohibited personnel practice based on different conduct from the conduct which serves as the basis of the agency's action.

The other exception, spelled out in section 1212(d)(2)(B)(ii) concerns cases in which



October 3, 1988

## CONGRESSIONAL RECORD — HOUSE

H 9321

Special Counsel has granted a waiver to an agency to proceed with disciplinary action notwithstanding the pendency of a Special Counsel investigation.

In addition, this provision authorizes the Special Counsel to "otherwise participate" in proceedings before the Board. This language is intended to authorize the Special Counsel to file amicus briefs on points of law. It is not intended to permit the Special Counsel to examine witnesses, introduce evidence, or otherwise participate in the development of the facts of the case, without the consent of the individual bringing the action.

Under no circumstances may the Special Counsel engage in *ex parte* contacts with the agency or supply information to agency management which would serve as the basis for agency action against an employee. Once again, the Special Counsel should not act to the detriment of employees who legitimately seek the Office's help.

#### 4. Special Counsel release of information about investigations

Section 1212(h) governs the Special Counsel's response to inquiries and provision of information concerning individuals who come to the Special Counsel for help. Again, the policy behind this provision is that employees should be able to go to the Special Counsel without fear of information being used against them. Section 1212(h)(1) provides that disclosures can only be made in accordance with the provisions of the Privacy Act. The language "as required by any other applicable Federal law" is intended to apply only in cases in which a statute specifically requires the Special Counsel to provide information otherwise protected by this section. It does not authorize the Special Counsel to disclose such information simply because the Special Counsel believes that such disclosure would facilitate the operation of another statute.

Section 1212(h)(2) states that, regardless of what the Privacy Act or some future enactment may provide, the Special Counsel can only release information concerning an employee's work performance, ability, aptitude, general qualifications, character, loyalty, or suitability under one of two circumstances. First, the information can be released with the advance written consent of the individual to whom the information pertains. Second, the information can be released to a federal agency when that agency is conducting a background check to clear an employee for access to Top Secret information, Sensitive Compartmented Information (SCI), or Q restricted data relating to atomic energy. The statutory language "information the unauthorized disclosure of which could be expected to cause exceptionally grave danger to the national security" comes directly from Executive Order No. 12356 and constitutes the definition of Top Secret information. The Special Counsel may not provide any information for a suitability check, a preemployment screening, whether by a private or governmental employer, or a background investigation for a clearance to Secret, Confidential or R-restricted data.

It is assumed that agencies conducting security clearance background checks will not establish procedures under which the Special Counsel is queried for any and all information it possesses on any individual who is being investigated for a high level clearance. Rather, inquiries will only be made when the investigators are following a lead otherwise uncovered which takes them to the Office of Special Counsel.

The restrictions on the disclosure of information cover both the period during which

the investigation is occurring and the period after the investigation is complete.

#### 5. Protection of identity of individuals making whistleblowing disclosures to Special Counsel

Section 1213(h)(2) provides that the Special Counsel may disclose the identity of an individual who discloses information to the Special Counsel only (1) with the individual's consent; (2) where necessary to carry out the functions of the Special Counsel; and (3) where "necessary because of an imminent danger to public health or safety or imminent violation of any criminal law." Again, the overriding purpose of the bill is to protect individuals who seek the assistance of the Special Counsel; they should not be subject to harm because they sought help. These exceptions are to be defined narrowly.

The exception concerning the carrying out of the functions of the Special Counsel means that a specific statutory of the Special Counsel means that a specific disclosure of the individual's name. For example, a decision by the Special Counsel to initiate an action before the MSPB may necessitate the disclosure of the identity of the individual on whose behalf the action is initiated. This provision is not intended to permit the Special Counsel to disclose an individual's identity, without that individual's consent, merely because such disclosure could be helpful in an investigation.

The imminent danger exception recognizes the countervailing public interest in protecting health and safety. The exception is quite narrow: it might be used, for example, where the Special Counsel learns that the individual making the disclosure plans to take violent action against a supervisor.

#### 6. Exhaustion requirement prior to filing individual right of action

Section 1214(a)(3) provides that employees, former employees, and applicants for employment must first seek the assistance of the Office of Special Counsel before bringing an individual right of action under section 1221. If the Special Counsel notifies the individual that the investigation has been terminated, the individual has 60 days in which to file an independent right of action. If the individual receives no notice of termination of the investigation within 120 days of filing the complaint, he or she may file an individual right of action at any time after the 120 day period has elapsed.

#### 7. Burden of proof

The bill makes it easier for an individual (or the Special Counsel on the individual's behalf) to prove that a whistleblower reprisal has taken place. To establish a *prima facie* case, an individual must prove that the whistleblowing was a factor in the personnel action. This supersedes the existing requirement that the whistleblowing was a substantial, motivating or predominant factor in the personnel action.

One of many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

The bill establishes an affirmative defense for an agency. Once the *prima facie* case has been established, corrective action would not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. Clear and convincing evidence is a higher standard of proof than the preponderance of the evidence standard now used.

With respect to the agency's affirmative defense, it is our intention to codify the test set out by the Supreme Court in the case of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977). The only change made by this bill as to that defense is to increase the level of proof which an agency must offer from "preponderance of the evidence" to "clear and convincing evidence."

#### 8. Other responsibilities of Special Counsel

Section 1216 clarifies the existing ancillary responsibilities of the Special Counsel. The authority of the Special Counsel to investigate allegations under section 1216(a)(4) is meant to cover major abuses of the civil service processes, such as political intrusion in personnel decisionmaking. The Special Counsel would be expected to investigate allegations of the type of wholesale politicization of civil service appointment procedures as occurred in the early 1970's under this authority. In such cases, the Special Counsel is authorized to seek corrective action, but not disciplinary action.

#### 9. Special Counsel public information

The bill establishes a new section of law (section 1219 of title 5, United States Code) which sets out the requirements on the Office of Special Counsel to maintain and make available to the public certain information. The public files of the Special Counsel should include the comments of the individual who discloses the information under section 1213 which leads to the agency report unless the individual does not consent to the public availability of such comments.

#### 10. Standards for stays in individual right of action cases

Section 1221(c) establishes the standards for stays and their dissolution in individual right of action cases. The bill provides that the Board shall determine whether the stay is appropriate, shall set the duration of the stay, as appropriate, and shall dissolve or modify the stay if appropriate. In making these determinations of appropriateness, the Board shall primarily consider whether there is a substantial likelihood that the individual will prevail on the merits and whether the stay would result in extreme hardship to the agency subject to the stay.

#### 11. Time limit for MSPB decisions in individual right of action cases

Section 1221(f)(1) provides that the Board shall issue a decision on an individual right of action as soon as practicable after it is filed. While prompt decisions are strongly encouraged, and, it should be noted, the Board has done a commendable job in meeting time limits in adverse action cases, such prompt decisions should not come at the expense of full discovery. No litigant, whether in an individual right of action or in an appeal from an adverse action, should be deprived of the right to find the information needed to prove his or her case because to permit such discovery would result in the case not being decided within the regulatory time limits.

#### 12. Attorneys fees

Section 1221(g) provides for the payment of reasonable attorneys fees in all types of proceedings before the MSPB or the courts where the employee, former employee, or applicant for employment prevails and the decision is based on the finding of a prohibited personnel practice. This provision is not limited to inadequate right of action cases.

MSPB and the courts have established substantial case law on what constitutes reasonable attorneys fees. The additional phrase "and any other reasonable costs incurred" is meant to include costs directly re-

lated to the litigation, such as photocopying, long distance telephone calls, and production of evidence, but is not meant to include other extraneous costs resulting from the prohibited personnel practice but not directly related to the litigation such as job counseling and retraining.

### 13. Election of remedies

The House version of the legislation contained a provision requiring an election of remedies between an appeal from an adverse action and an individual right of action. This provision was deleted because of concern that a jurisdictional loss in an adverse action appeal could bar an individual pursuing an individual right of action. Nevertheless, it is not intended that the MSPB hear the same case twice. If an individual has pursued the matter before MSPB on the merits under one right of action, the Board is expected to dismiss a case brought under another authority concerning the same matter under the doctrine of *stare decisis*.

### 14. Retirement does not cut off adverse action right

Section 1221(j) provides that the decision of an employee to retire when faced with a proposed adverse action does not cut off that employee's right to appeal to MSPB to challenge the adverse action. This section is not limited to individual right of action cases. If an individual who has retired or received a lump sum refund is subsequently reinstated pursuant to a MSPB or court decision with back pay, the Back Pay Act (5 U.S.C. 5596) provides that adjustments shall be made to provide that the individual is treated as if the unjustified personnel action had never occurred. Under this theory, the individual receives back pay. If that happens, the money received from the retirement fund should be treated as if it were erroneously paid and the Office of Personnel Management should recover the erroneous payment. The waiver provisions under sections 8346(b) and 8470(b) of title 5 should not be applicable.

### 15. Availability of other remedies

The bill contains a new section 1222 of title 5, United States Code, which provides that the network of rights and remedies created under chapter 12 and chapter 23 of title 5 is not meant to limit any right or remedy which might be available under any other statute. Other statutes which might provide relief for whistleblowers include the Privacy Act, a large number of environmental and labor statutes which provide specific protections to employees who cooperate with federal agencies, and civil rights statutes under title 42, United States Code. Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision. Rather, section 1222 says it is not the intent of Congress that the procedures under chapters 12 and 23 of title 5, United States Code, are meant to provide exclusive remedies.

### 16. Changes in whistleblowing prohibited personnel practice

The bill makes certain changes in the definition of reprisal for whistleblowing (5 U.S.C. 2302(b)(8)). Among the changes or the inclusion of threats as a prohibited personnel practice, both with relation to whistleblowing and in relation to prohibited personnel practices defined in section 2302(b)(9). Mere harassment and threats, without any formally proposed personnel action, can constitute a prohibited personnel practice under this language.

It is obvious, but worth noting, that no Executive order, regulation, or contract can extinguish the rights provided under section 2302 of title 5. Employees have been re-

quired to sign security agreements as a condition for gaining access to classified information which seem to suggest that the signers of such agreements could be punished for disclosures protected by 5 U.S.C. 2302(b)(9). Insofar as these agreements seem to limit the ability of whistleblowers to exercise rights provided under chapters 12 and 23 of title 5, the security agreements are not valid.

Nevertheless, nothing in this bill permits the disclosure of classified information to any uncleared individual. Sections 2302 and 1213 set out clear channels for disclosure of wrongdoing in classified form. Such information can be properly and legally disclosed to the Special Counsel, to the Inspector General of an agency, or to a member of Congress.

### 17. Changes in appeal right prohibited personnel practice

The bill establishes a new prohibited personnel practice which protects employees in their right to refuse to obey an order that would require the individual to violate a law. This is a narrower form of a provision that was in H.R. 25, as reported. The establishment of this protection is meant to achieve a balance between the right of American citizens to a law-abiding government and the desire of management to prevent insubordination.

### EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET.

Washington, DC, October 3, 1988.

HON. PATRICIA SCHROEDER,  
House of Representatives,  
Washington, DC.

DEAR CONGRESSWOMAN SCHROEDER: I would like to commend you for the hard work you have put in over the last eight months on S. 508, the "Whistleblow Protection Act of 1988." While the bill does not provide everything we wanted it will enhance the protection of whistleblowers—a goal which the Administration shares with you.

For the first time a whistleblower will have an independent right to take his case to the Merit System Protection Board (MSPB) and to request that MSPB issue a stay order on his behalf. The bill would also establish threats to take or not take an action as a prohibited personnel practice and would grant whistleblowers preferential treatment in certain transfer actions. Further, the Office of Special Counsel would be established as an agency separate from the MSPB with enhanced authorities.

Pat, thank you for working with Congressman Horton and the Administration on this important legislation.

Best Regards,

JOSEPH R. WRIGHT, Jr.,  
Deputy Director.

Mr. HORTON. Mr. Speaker, I yield myself such time as I may consume.

(Mr. HORTON asked and was given permission to revise and extend his remarks, and include extraneous matter.)

Mr. HORTON. Mr. Speaker, I rise in strong support of this legislation. It is an excellent bill that I believe will vastly improve our Government's ability to protect those Federal employees who disclose waste and wrongdoing in the Federal bureaucracy. It will help protect these employees from adverse actions that they sometimes endure as a result of their disclosures.

The bill accomplishes this in a number of ways, but principally, it improves the operational and authority

structure of the Office of Special Counsel, which is the Federal entity responsible for whistleblower protection. One of the principal functions of this office, upon its establishment by the 1978 Civil Service Reform Act, was to protect whistleblowers and investigate their allegations.

Hearings conducted by our Civil Service Subcommittee, both in this and in the previous 99th Congress, identified operational deficiencies in the Office of Special Counsel. They also highlighted problems about the mission of the special counsel. This bill, S. 508, addresses both of these areas. It makes very clear that both whistleblower protection and the investigation of whistleblower allegations are principal responsibilities of the Office. It also gives broader authority to the special counsel to exercise its responsibilities.

The bill restricts and specifies the conditions under which disclosures to the special counsel can be released. It makes it easier for whistleblowers to prove a connection between their disclosures of wrongdoing and resultant adverse actions taken against them. The bill requires the regular reporting to whistleblowers of the status of their case. Further, and of great importance is a provision of the bill granting the special counsel the authority to stay actions taken against employees.

Legitimate whistleblowers deserve the fullest protection we can provide. This bill makes great strides forward in providing that protection. And, I might add, it does this without diminishing the ability of agencies and departments to fulfill their respective missions.

It has taken literally two Congresses to reach this point, a point where we now have legislation acceptable to the House, the Senate and the administration. This was no easy task; it took many many hours of hard and sometimes strained negotiation. Two individuals deserve credit for this accomplishment. They are the chair of my Civil Service Subcommittee PAT SCHROEDER and the Deputy Director—soon to be Director—of the Office of Management and Budget, Joe Wright. Both of these individuals and their staffs worked countless hours and overcame countless frustrations to reach this point.

I have the highest regard for Joe Wright, who made a commitment to me and Chair SCHROEDER in early 1987 that he would work with us to finish a good bill. He did just that. Without his leadership, we would not be here today with the consensus we enjoy.

And finally, to the chairperson of the Civil Service Subcommittee, PAT SCHROEDER. You and I have worked on this bill now for 4 years. Clearly, we are here today because of your leadership, your commitment to whistleblowers, and your ability to negotiate and strike a fair compromise. My hat goes off to you and your staff. It is to

October 3, 1988

## CONGRESSIONAL RECORD — HOUSE

H 9323

your credit that we will pass legislation today that does not just pass the House and die, but that will, I am sure, pass the House, the Senate, and finally, be signed into law by the President.

Congratulations it has been and is a pleasure to work with you.

OFFICE OF MANAGEMENT AND BUDGET,

Washington, DC, October 3, 1988.

HON. FRANK HORTON,

U.S. House of Representatives, Washington, DC.

DEAR CONGRESSMAN HORTON: I would like to congratulate you on the fine work you have done over the last eight months to develop the "Whistleblower Protection Act of 1988." While this bill does not include everything we wanted, it will significantly improve protection for whistleblowers—a goal which the Administration shares with you.

For the first time a whistleblower will have an independent right to take his case to the Merit Systems Protection Board (MSPB) and to request that MSPB issue a stay order on his behalf. The bill would also establish threats to take or not take an action as a prohibited personnel practice and would grant whistleblowers preferential treatment in certain transfer actions. Further, the Office of Special Counsel would be established as an agency separate from the MSPB with enhanced authorities.

These new authorities are significant and I would like to thank you personally for the repeated efforts you have made to work with the Administration on developing S. 508.

Best regards,

JOSEPH R. WRIGHT, Jr.,  
Deputy Director.

□ 1545

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mrs. SCHROEDER. Mr. Speaker, I want to thank the gentleman from New York [Mr. HORTON] again, and I thank the staff as well for their patience. I appreciate the time, the effort, and the conviction of all these people. This has been an absolutely amazing effort.

Mr. GILMAN. Mr. Speaker, I rise in support of the Whistleblower Protection Act and I commend the gentlelady from Colorado Mrs. SCHROEDER for crafting this bill. The bill provides stronger protection to Federal employees who disclose waste, mismanagement, danger to public safety, and violations of law. It changes the primary role and focus of the Office of Special Counsel [OSC] to protection of employees who claim to be the victims of reprisals for whistleblowing.

Ninety days after enactment, the bill strengthens rights of civil service employees by:

Expanding the OSC role to act as an advocate for individual whistleblowers—similar to the role of attorney-client—rather than an independent enforcer of the Federal personnel merit system;

Establishing the OSC as an independent agency with authorizations of \$5 million in each of fiscal years 1989-91;

Not disclosing the identity of an informant without the informant's permission;

Creating an individual right of action allowing employees to seek stays and corrective actions directly from MSPB instead of going through the OSC;

Providing judicial review for individuals adversely affected by a decision or order of the MSPB; and

Permitting individuals who are the prevailing party in an adverse action appeal to receive interim relief based on an administrative judge's decision rather than waiting for the outcome of any petition for review of the decision.

The time has come to ensure that whistleblowers are completely protected by Federal law. This bill goes a long way toward that end. Accordingly, I urge my colleagues to support S. 508.

Mrs. SCHROEDER. Mr. Speaker, I have no further requests for time, and I yield back the balance of time.

The SPEAKER pro tempore (Mr. MONTGOMERY). The question is on the motion offered by the gentlewoman from Colorado [Mrs. SCHROEDER] that the House suspend the rules and pass the Senate bill, S. 508, as amended.

The question was taken.

Mr. WALKER. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 5 of rule I and the Chair's prior announcement, further proceedings on this motion will be postponed.

## GENERAL LEAVE

Mrs. SCHROEDER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the legislation just considered.

The SPEAKER pro tempore. Is there objection to the request of the gentlewoman from Colorado?

There was no objection.

## AGRICULTURAL QUARANTINE ENFORCEMENT ACT

Mr. McCLOSKEY. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 5199) to make nonmailable any plant, fruit, vegetable, or other matter, the movement of which in interstate commerce has been prohibited or restricted by the Secretary of Agriculture in order to prevent the dissemination of dangerous plant diseases or pests, and for other purposes, as amended.

The Clerk read as follows:

H.R. 5199

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

## SECTION 1. NONMAILABLE PLANTS.

(a) AMENDMENTS TO TITLE 39.—

(1) IN GENERAL.—Chapter 30 of title 39, United States Code, is amended by adding at the end the following:

"§ 3014. Nonmailable plants

"(a)(1) Whenever the Secretary of Agriculture establishes a quarantine under section 8 of the Plant Quarantine Act, prohibiting the transportation by common carrier of any plant from any State or other geographic area, the Secretary shall give notice of the establishment of such quarantine to the Postal Service in writing.

"(2) Upon receiving any such notice under paragraph (1), the Postal Service shall ensure that copies of such notice are prominently displayed at post offices located within each State or area covered by the quarantine, and shall take any other measures which the Postal Service considers necessary in order to inform the public both of the establishment of such quarantine and of relevant provisions of this section and sections 1716B and 1716C of title 18 in connection therewith.

"(b) Any plant, the transportation of which by common carrier from any State or other area is prohibited or restricted under any quarantine referred to in subsection (a), is nonmailable matter, and may not be accepted by the Postal Service or conveyed in the mails, if the matter involved is tendered for transmission through the mails from such State or area or if such matter first enters the mails within such State or area.

"(c) The Postal Service shall, after consultation with the Secretary of Agriculture, prescribe rules and regulations permitting the mailing of a plant, and otherwise making subsection (b) of this section inapplicable with respect to such plant, if the method or manner of mailing such plant would be consistent with the procedures set forth in the rules and regulations prescribed under the fourth sentence of section 8 of the Plant Quarantine Act (relating to the inspection, disinfection, and certification of, and other conditions for, the delivery and shipment of plants otherwise subject to quarantine).

"(d) For the purposes of this section—

"(1) 'Plant Quarantine Act' means the Act entitled 'An Act to regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom, and for other purposes', enacted August 20, 1912 (37 Stat. 315 et seq.); and

"(2) 'plant' means any class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, any class of nursery stock (as defined by section 6 of the Plant Quarantine Act), and any other article or matter which is capable of carrying any dangerous plant disease or pest."

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 30 of title 39, United States Code, is amended by adding after the item relating to section 3013 the following:

"3014. Nonmailable plants."

(b) AMENDMENTS TO TITLE 18.—

(1) IN GENERAL.—Title 18, United States Code, is amended by inserting after section 1716A the following:

"§ 1716B. Nonmailable plants

"Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon, or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by section 3014(b) of title 39, unless in accordance with the rules and regulations prescribed by the Postal Service under section 3014(c) of such title, shall be fined under this title, or imprisoned not more than one year, or both."

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 83 of title 18, United States Code, is amended by inserting after the item relating to section 1716A the following:

"1716B. Nonmailable plants."